A **MRINAL DAS & ORS**

v.

STATE OF TRIPURA

B SUPREME COURT, INDIA
(2011) 9 SUPREME COURT CASES 479
P SATHASIVAM SCJ
HL GOKHALE SCJ
[CRIMINAL APPEAL NO: 1994 OF 2009†
C WITH NO. 1719 OF 2011‡]
5 SEPTEMBER 2011

[EVIDENCE] *Evidence Act, 1872 - Section 133 r/w s. 114 Ill. (b) - Approver - Testimony - Evidentiary value - Corroboration - Rule of*
D *prudence - Held, though a conviction is not illegal merely because it proceeds on uncorroborated testimony of an approver, yet universal practice is not to convict upon testimony of an accomplice unless it is corroborated in material particulars - Insistence upon corroboration is based on rule of caution and is not merely a rule of law - Corroboration need not be in*
E *form of ocular testimony of witnesses and may even be in form of circumstantial evidence - Further held, once evidence of approver is held to be trustworthy, it must be shown that story given by him so far as an accused is concerned, must implicate accused concerned in such manner as to give rise to a conclusion of guilt beyond reasonable doubt - However,*
F *where evidence of approver is found unreliable, worth of his evidence is lost and such evidence, even by seeking corroboration cannot be foundation of conviction - On facts held, testimony of PW 6 approver was found reliable, which was corroborated by other PWs - Hence, conviction based thereon sustainable - Criminal Trial - Witnesses - Accomplice/Approver -*
G *Criminal Procedure Code, 1973, ss. 306 to 308 (paras 17, 18, 29 & 43)*

Bhiva Doulu Patil v. State of Maharashtra, AIR 1963 SC 599: (1963) 1 Cri LJ 489 : (1963) 3 SCR 830; Mohd Husain Umar
H *Kochra v. KS Dalipsinghji, (1969) 3 SCC 429 : 1970 SCC (Cri) 99; Sarwan Singh v. State of Punjab, AIR 1957 SC 637 : 1957 Cri LJ 1014 : 1957 SCR 953; Ravinder Singh v. State of*

I † From the Judgment and Order dated 29 January 2008 of the High Court of Gauhati, Agartala Bench in Crl. A. No. 90 of 2005

‡ Arising out of SLP (Crl.) No. 6728 of 2011 (Crl. MP No. 17812 of 2008)

Haryana, (1975) 3 SCC 742 : 1975 SCC (Cri) 202; Abdul Sattar v. UT, Chandigarh, 1985 Supp SCC 599 : 1985 SCC (Cri) 505; Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60; Ramprasad v. State of Maharashtra, (1999) 5 SCC 30 : 1999 SCC (Cri) 651; Narayan Chetanram Chaudhary v. State of Maharashtra, (2000) 8 SCC 457 : 2000 SCC (Cri) 1546; K Hashim v. State of TN, (2005) 1 SCC 237 : 2005 SCC (Cri) 292; Sitaram Sao v. State of Jharkhand, (2007) 12 SCC 630 : (2008) 3 SCC (Cri) 319; Sheshanna Bhumanna Yadav v. State of Maharashtra, (1970) 2 SCC 122 : 1970 SCC (Cri) 337; Dagdu v. State of Maharashtra, (1977) 3 SCC 68 : 1977 SCC (Cri) 421; Rampal Pithwa Rahidas v. State of Maharashtra, 1994 Supp (2) SCC 73 : 1994 SCC (Cri) 851, followed

Lachhi Ram v. State of Punjab, AIR 1967 SC 792 : 1967 Cri LJ 671 : (1967) 1 SCR 243; Bhuboni Sahu v. R, (1948-49) 76 IA 147; State of Bihar v. Basawan Singh, AIR 1958 SC 500 : 1958 Cri LJ 976; Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184 : (1964) 2 Cri LJ 344; Haroon Haji Abdulla v. State of Maharashtra, AIR 1968 SC 832 : 1968 Cri LJ 1017, cited

[CRIMINAL PROCEDURE] *Criminal Procedure Code, 1973 - Sections 306, 307 and 308 - Delay in seeking pardon and turning approver (four years' delay from incident) - Effect on reliability of testimony of approver - Held, pardon can be sought and can be tendered at any time after commitment of a case but before judgment is pronounced - In instant case, trial commenced on 11 March 2003 and PW 6 submitted his application to become approver on 16 June 2004 well before judgment which was delivered on 19 April 2005 - Hence, contention regarding delay on part of PW 6 to seek pardon thereby making his testimony unreliable, liable to be rejected - Moreover, PW 6 was one of the 13 accused charged with murder and was privy to offence - He categorically narrated entire occurrence right from its inception to culmination, thus making a full and true disclosure of circumstances within his knowledge - He asserted that he repented the act and had lost his peace of mind, and his decision to disclose was voluntary - Besides, his testimony was corroborated by other eyewitnesses in all aspects and he identified all accused in court by name and face - Hence, High Court was absolutely justified in accepting his testimony (paras 31 to 43)*

The appellant-accused submitted that in as much as PW 6 waited for four years to change his mind and sought pardon for his action, his statement is not reliable and the courts below ought to have rejected his testimony. Rejecting this submission, the Supreme Court held as above.

A ***[CRIMINAL PROCEDURE]*** *Criminal Procedure Code, 1973 - Sections 306, 307 and 308 - Tender of pardon to accomplice - Object of - Held, object of s. 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with aid of evidence of person granted pardon, offence may be unravelled - Such*
B *accomplice gets protection from prosecution on condition of making a full and true disclosure of circumstances within his knowledge concerning offence - Where approver suppresses anything material and essential within his knowledge or fails or refuses to comply with the condition on which tender was made, protection given to him can be lifted - Accused granted*
C *pardon ceases to be an accused and becomes witness for prosecution (paras 33 and 34)*

[CRIMINAL LAW] *Penal Code, 1860 - Section 302 r/w s. 34 - Political murder - Eyewitness account - Corroboration by approver -*
D *Conviction confirmed - Alleged that 13 assailants planned and remained present on shore to eliminate deceased, and when deceased disembarked from boat, A-12 (approver and examined as PW 6) dragged him down, and when he fell on ground A-5 and A-11 shot him causing severe bullet injuries consequent to which he died - PW 6 approver making a full and*
E *true disclosure of circumstances culminating in death of deceased - His testimony corroborated by other PWs particularly eyewitnesses in all aspects including conspiracy, planning to attack deceased for his statement about the students' movement, actual incident, role played by assailants and subsequent events after gunshot till death of deceased - Common*
F *intention to eliminate deceased proved - No inconsistency between contents of post-mortem report, evidence of PW 14 (doctor who conducted post-mortem) and ocular evidence of PW 6 - Assailants identified by PWs including PW 6 - Hence, impugned judgment setting aside acquittal of A-4, A-7, A-9 and A-1 and convicting them under ss. 302/34 and*
G *affirming conviction of A-5 & A-11 under s. 302 calls for no interference*

[CRIMINAL PROCEDURE] *Criminal Procedure Code, 1973 - Sections 378 and 386 - Appeal against acquittal - Powers of appellate court - Nature and scope - Restated*

H It was alleged that after the meeting convened by DYFI was over, when the deceased (leader of DYFI) and his companions PWs 1, 2, 3, 10, 11 and 12 disembarked from boat, A-12 dragged him, and when the deceased fell down A 5 and A-11 shot him causing severe bullet injuries, consequent to which he died. Charges were
I framed against 13 accused under s. 302 read with ss. 34/120-B IPC and s. 27 of the Arms Act. The trial court convicted A-5 and A-11 under s. 302 and sentenced them to RI for life and to pay

fine of Rs 3000 with default stipulation, while acquitting the rest. A-12 turned an approver and was examined as PW 6. In appeal filed there against by the State, the High Court by the impugned judgment set aside acquittal of A-4, A-9, A-7 and A-1, and convicted them under Sections 302/34 IPC sentencing them to LI and to pay fine of Rs 3000. The appeal filed by A-5 and A-11 was dismissed by the High Court. Instant appeals were filed by all convicted accused by special leave.

Dismissing the appeals, the Supreme Court

Held:

In an appeal against acquittal, in the absence of perversity in the judgment and order, interference by the Supreme Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, it being the final court of fact, is fully competent to reappreciate, reconsider and review the evidence and take its own decision. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (paras 13 & 14)

State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162; Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325, followed

State of UP v. Jagram, (2009) 17 SCC 405 : (2011) 1 SCC (Cri) 1040; Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385; Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179; Ganpat v. State of Haryana, (2010) 12 SCC 59 : (2011) 1 SCC (Cri) 309; Sunil Kumar Sambhudayal Gupta v. State of Maharashtra, (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375; State of UP v. Naresh, (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216; State of MP v. Ramesh, (2011) 4 SCC 786 : (2011) 2 SCC (Cri) 493, relied on

A On facts held, in the light of the disclosure made by the approver (PW 6), coupled with the statement of the eyewitnesses, it is clear that the 13 assailants had planned and remained present on the shore of the river to eliminate the deceased. Hence, the High Court was justified in convicting A-9, A-7, A-4 and A-1 by
B invoking s. 34 IPC setting aside their acquittal while confirming conviction of A-5 and A-11. (para 78)

[CRIMINAL PROCEDURE] *Criminal Trial - Appreciation of Evidence - Credibility of witness - Non-disclosure of incident by PW 1*
C *to police officials travelling in police van in which deceased was taken to hospital - Held, was inconsequential since it is but natural that victim receiving gunshot injury need to be admitted in hospital first and only thereafter next step including making complaint to police could be thought of - Further held, omission to mention some details in complaint was also*
D *irrelevant, since all relevant details were mentioned in complaint and omissions were only negligible - No justification to reject PW 1's testimony on such grounds (paras 50 & 57)*

[CRIMINAL PROCEDURE] *Criminal Trial - Witnesses - Hostile*
E *witness - Testimony - Evidentiary value - Reiterated, evidence of hostile witness need not be rejected in its entirety but may be relied on for corroboration - Further reiterated, credible evidence of even hostile witnesses can form basis for conviction - In matter of appreciation of evidence of witnesses it is not number of witnesses but quality of their evidence that*
F *is important*

[CRIMINAL PROCEDURE] *Criminal Trial - Witnesses - Eyewitness - Testimony - Offence involving large number of offenders - Corroboration - Necessity - Held, where large number of offenders are involved, it is necessary to seek corroboration at least from two or more witnesses as a*
G *measure of caution - Penal Code, 1860 - Section 302 r/w s. 34 - Large number of offenders - Principles for appreciation of evidence*

Held:

H It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile furnishes no justification for rejecting *en bloc* the evidence of the witness. However, the court has to be very careful, as *prima facie*, a witness who makes
I different statements at different times, has no regard for the truth. His deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution. (para 67)

In instant case, the eyewitnesses including the hostile witnesses, firmly established the prosecution version. Five eyewitnesses, namely, PW 1, PW 4, PW 6, PW 7 and PW 8 clearly identified two convicts, appellants A-5 and A-11. PWs 1, 4, 7 and 8 identified accused A-9. PWs 1 and 7 identified accused A-7. PWs 1 and 4 identified A-4. PWs 4 and 8 identified A-1. It is clear that 6 accused persons including two convicts/appellants had been identified by more than one eyewitnesses. The general principle of appreciating evidence of eyewitnesses in such a case is that where a large number of offenders are involved, it is necessary for the court to seek corroboration, at least, from two or more witnesses as a measure of caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eye witnesses is less than two. In a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. (paras 68 and 69)

[CRIMINAL LAW] *Penal Code, 1860 - Section 34 - Common intention - Proof or inference of - Extent to which overt acts of various accused need to be proved - Burden of proof, held, lies on the prosecution to prove actual participation of more than one person for commission of criminal act done in furtherance of common intention - Common intention can be developed on spur of moment but there must be prearrangement or premeditated concept - Not necessary that individual act of accused persons has to be proved by direct evidence, nor that acts of accused charged jointly must be same or identically similar - Common intention has to be inferred from proved facts and circumstances and once there exists common intention, mere presence of accused persons among the assailants would be sufficient proof of their participation in offence - On facts held, in light of disclosure made by the approver (PW 6), coupled with statement of eyewitnesses, it is clear that the 13 assailants had planned and remained present on shore of river to eliminate deceased - High Court was justified in invoking s. 34 for convicting 6 accused including two convicted appellants*

Held:

The existence of common intention amongst the participants in the crime is the essential element for application of s. 34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. It is also not necessary that individual act of the accused persons has to be proved by the prosecution by direct evidence. Common intention has to be inferred from proved facts and

A circumstances and once there exists common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in the offence. The evidence of eyewitnesses as well as the approver (PW 6) establishing that A-8 was deployed at the place of meeting at Santinagar for the B purpose of intimating to other accused persons about movement of the deceased and some accused were stationed on the shore of the river. When boat carrying deceased and other eye witnesses was about to reach the shore, A-1 who was deployed there suddenly left towards PO and within few minutes 10 C accused persons rushed there. Thereafter, the occurrence took place. Thus, the common intention can be inferred among the accused persons including the six persons identified by the eyewitnesses. (paras 72 and 74 to 78)

D ***[CRIMINAL LAW]*** *Penal Code, 1860 - Sections 34 and 149 - Common intention and common object - Difference - Restated*

Held:

A clear distinction made out between common intention and E common object is that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is substantial difference between the F two sections, to some extent they also overlap and it is a question to be determined on the facts of each case. (para 73)

Chronological list of cases cited:

State of MP v. Ramesh (2011) 4 SCC 786 : (2011) 2 SCC (Cri) 493
G *State of UP v. Naresh (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216*
Sunil Kumar Sambhudayal Gupta v. State of Maharashtra (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375
Ganpat v. State of Haryana (2010) 12 SCC 59 : (2011) 1 SCC (Cri) 309
Babu v. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179
Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1 : (2010) 2 SCC
H *(Cri) 1385*
State of UP v. Jagram (2009) 17 SCC 405 : (2011) 1 SCC (Cri) 1040
Sitaram Sao v. State of Jharkhand (2007) 12 SCC 630 : (2008) 3 SCC (Cri) 319
Chandrappa v. State of Karnataka (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325
I *State of Goa v. Sanjay Thakran (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162*
K Hashim v. State of TN (2005) 1 SCC 237 : 2005 SCC (Cri) 292

Narayan Chetanram Chaudhary v. State of Maharashtra (2000) 8 SCC 457 : 2000 SCC (Cri) 1546
Ramprasad v. State of Maharashtra (1999) 5 SCC 30 : 1999 SCC (Cri) 651
Suresh Chandra Bahri v. State of Bihar 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60
Rampal Pithwa Rahidas v. State of Maharashtra 1994 Supp (2) SCC 73 : 1994 SCC (Cri) 851
Abdul Sattar v. UT, Chandigarh 1985 Supp SCC 599 : 1985 SCC (Cri) 505
Dagdu v. State of Maharashtra (1977) 3 SCC 68 : 1977 SCC (Cri) 421
Ravinder Singh v. State of Haryana (1975) 3 SCC 742 : 1975 SCC (Cri) 202
Sheshanna Bhumanna Yadav v. State of Maharashtra (1970) 2 SCC 122 : 1970 SCC (Cri) 337
Mohd Husain Umar Kochra v. KS Dalipsinghji (1969) 3 SCC 429 : 1970 SCC (Cri) 99
Haroon Haji Abdulla v. State of Maharashtra AIR 1968 SC 832 : 1968 Cri LJ 1017
Lachhi Ram v. State of Punjab AIR 1967 SC 792 : 1967 Cri LJ 671 : (1967) 1 SCR 243
Haricharan Kurmi v. State of Bihar AIR 1964 SC 1184 : (1964) 2 Cri LJ 344
Bhiva Doulu Patil v. State of Maharashtra AIR 1963 SC 599 : (1963) 1 Cri LJ 489 : (1963) 3 SCR 830
State of Bihar v. Basawan Singh AIR 1958 SC 500 : 1958 Cri LJ 976
Sarwan Singh v. State of Punjab AIR 1957 SC 637 : 1957 Cri LJ 1014 : 1957 SCR 953
Bhuboni Sahu v. R (1948-49) 76 IA 147

For the appellants - Sidharth Luthra, Senior Advocate (Satyanarayan and Siddhartha Chowdhury, Advocates)
For the respondent - Anuj Prakash and Gopal Singh, Advocates

JUDGMENT

P Sathasivam SCJ:

Criminal Appeal No. 1994 of 2009

[1] This appeal is filed against the final judgment and order dated 29 January 2008 passed by the Gauhati High Court, Agartala Bench in Criminal Appeal No. 90 of 2005 whereby the Division Bench of the High Court, on an appeal filed by the State of Tripura, the respondent herein, reversed the order of acquittal of the appellants herein dated 19 April 2005 passed by the

A Additional Sessions Judge, Khowai, West Tripura in Case ST No. 54(WT/K) of 2002 and convicted and sentenced them to imprisonment for life under s. 302 read with s. 34 of the Penal Code, 1860 (hereinafter referred to as "IPC") with a fine of Rs 3000 each, in default, to suffer a further term of simple
B imprisonment for three months.

Criminal Appeal No. 1719 of 2011 @ SLP (Crl.) No. 6728 of 2011 (Crl. MP No. 17812 of 2008)

C **[2]** The convicted accused, Tapan Das (A-5) and Gautam Das (A-11), against the same order of the High Court dated 29 January 2008 confirming their conviction under s. 302 IPC and imposing life sentence with a fine of Rs 3000 each, in default, to suffer simple imprisonment for three months filed this appeal by
D way of special leave petition with a delay of 62 days. Delay condoned. Leave granted.

Brief Facts

[3] On 31 August 2000, a meeting was convened in West
E Santinagar SB School at the invitation of Durgapur Local Committee of Democratic Youth Federation of India (in short "DYFI"). After the meeting was over, Tapan Chakraborty (since deceased), a leader of DYFI accompanied by Babul Dey (PW 1), Ganesh Kol (PW 2), Nilai Das (PW 3), Ramakanta Paul (PW 10),
F Benu Ranjan Dhupi (PW 11) and Prabir Biswas (PW 12) reached Santinagar Ferry Ghat to cross the river on way to home, on the other side of the river. At about 6.30pm, when Tapan Chakraborty and his companions disembarked from the boat, Ratan Sukladas (A-12) dragged him down and when he fell on the
G ground, Tapan Das (A-5) and Gautam Das (A-11) shot at him causing severe bullet injuries. After finishing their job, the assailants fled away. The victim was immediately taken to the local hospital but as he was sinking, he was referred to GB Hospital at Agartala for specialised treatment. The victim died on the way to hospital.

H **[4]** On the very same day, at about 8.35pm, one Babul Dey (PW 1) lodged a first information report (in short "the FIR") being FIR No. 85 of 2000 with Police Station Kalyanpur, West Tripura, Tripura. On the basis of the FIR, a case was registered
I under ss. 148, 149, 326 and 307 IPC read with s. 27 of the Arms Act, 1959 against eight persons viz. Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A 5), Ashim Bhattacharjee (A-2), Pradip Das (A-9), Shailendra Das (A 3), Subal Deb (A 10) and

Gautam Das (A-11) and others. After the death of Tapan Chakraborty, s. 302 IPC was also added against the accused persons.

[5] During the investigation, the investigating officer arrested 13 accused persons and on completion, filed a report under s. 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") under ss. 148, 149, 326 and 302 IPC and s. 27 of the Arms Act against Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A-5), Ashim Bhattacharjee (A-2), Pradip Das (A-9), Shailendra Das (A-3), Subal Deb (A 10), Gautam Das (A-11), Anil Das (A-1), Bikash Das (A-6), Uttam Shil (A-8), Ratan Sukladas (A-12) and Radha Kant Das (A-13). *Vide* order dated 12 August 2002, the Additional Sessions Judge, Khowai, West Tripura, framed charges under ss. 148, 149 and 302 IPC against all the 13 accused persons. Thereafter, on 20 November 2002, on the request of the Special Public Prosecutor to alter the charges, the Additional Sessions Judge modified the charges under Section 302 read with Sections 34/120 B IPC and s. 27 of the Arms Act.

[6] During the recording of evidence, on 16 June 2004, accused Ratan Sukladas (A-12) filed an application praying for grant of "pardon" and to treat him as an "approver" which was granted by the trial court. After examining all the witnesses, the trial court, vide judgment dated 19 April 2005, acquitted Anil Das (A-1), Ashim Bhattacharjee (A-2), Shailendra Das (A-3), Mrinal Das (A-4), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10) and Radha Kant Das (A-13) of the charges levelled against them and convicted Tapan Das (A-5) and Gautam Das (A-11) for the offences punishable under s. 302 IPC and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs 3000 each, in default, to further undergo simple imprisonment for three months.

[7] Aggrieved by the judgment of the trial court, Tapan Das (A-5) and Gautam Das (A-11) filed an appeal being Criminal Appeal No. 47 of 2005 in the Gauhati High Court, Agartala Bench. The State of Tripura also filed Criminal Appeal No. 90 of 2005 against the order of acquittal of ten accused persons by the trial court. The High Court, by the impugned common judgment dated 29 January 2008, dismissed the appeal filed by the convicted accused persons (A-5 and A-11) and partly allowed the appeal filed by the State by setting aside the acquittal of four persons, namely, Mrinal Das (A-4), Pradip Das (A 9), Somesh Das

(A-7) and Anil Das (A-1) and convicted them under Sections 302/34 IPC and sentenced them with imprisonment for life with a fine of Rs 3000 each, in default, to suffer a further term of simple imprisonment for three months.

[8] Aggrieved by the common impugned judgment dated 29 January 2008 passed by the Division Bench of the High Court, all the convicted accused persons filed these appeals before this court by way of special leave. *Vide* this court's order dated 16 September 2009, the name of Pradip Das, appellant two herein and A-9 before the trial court has been deleted from the array of the parties as he is not traceable.

[9] Heard Mr Sidharth Luthra, learned Senior Counsel for the appellants and Mr Anuj Prakash, learned counsel for respondent State.

Legal Position With Regard To Interference In Appeal Against Acquittal

[10] Since the High Court has interfered in the case of acquittal, let us consider the general principles enunciated by this court with regard to the same.

[11] In *State of Goa v. Sanjay Thakran*[1] this court while considering the power of the appellate court to interfere in an appeal against acquittal, after adverting to various earlier decisions on this point has concluded as under: (SCC p. 768, para 16)

> 16. … while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterised as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.

[12] In *Chandrappa v. State of Karnataka*[2], while considering the similar issue, namely, appeal against acquittal and power of the appellate court to reappreciate, review or reconsider evidence and interfere with the order of acquittal, this court reiterated the principles laid down in the above decision and further held that: (SCC p. 432, para 42)

> 42. … the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

The same principles have been reiterated in several recent decisions of this Court *vide* State of *UP v. Jagram*[3], *Manu Sharma v. State (NCT of Delhi)*[4], *Babu v. State of Kerala*[5], *Ganpat v. State of Haryana*[6], *Sunil Kumar Sambhudayal Gupta v. State of Maharashtra*[7], *State of UP v. Naresh*[8] and *State of MP v. Ramesh*[9].

[13] It is clear that in an appeal against acquittal, in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, it being the final court of fact, is fully competent to reappreciate, reconsider and review the evidence and take its own decision. In other words, the law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence, every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

[14] There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons, set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed.

[15] With the above principles, let us analyse the reasonings and ultimate conclusion of the High Court in interfering with the order of acquittal and also the confirmation of sentence on the two convicted appellants.

Evidentiary Value Of Approver/Accomplice

[16] Before considering the impugned judgment on merits, in as much as the High Court heavily relied on the evidence of the "approver", let us find out the legal position about the evidentiary value of "approver" and its acceptability with or without corroboration.

[17] Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars. The evidence of an approver does not differ from the evidence of any other witness save in one particular aspect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. If the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particulars; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon the evidence alone.

[18] In order to understand the correct meaning, and application of this term, it is desirable to mention s. 133 of the Evidence Act, 1872 along with Illustration (b) to s. 114 which read as under:

> 133. Accomplice.-An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.
>
> Illustration (b) to Section 114
>
> The court may presume:
>
> * * *
>
> (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

[19] Dealing with the scope and ambit of the abovenoted two provisions, this court, in *Bhiva Doulu Patil v. State of Maharashtra*[10], has held that both the sections are part of one subject and have to be considered together. It has further been held: (AIR p. 601, para 7)

> 7. The combined effect of Sections 133 and 114, Illustration (b) may be stated as follows: according to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.

[20] The very same principle was reiterated in *Mohd Husain Umar Kochra v. KS Dalipsinghji*[11] and it was held: (SCC p. 438, para 21)

> 21. … The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal the court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another ...

[21] While considering the validity of the approver's testimony and tests of credibility, this court, in *Sarwan Singh v. State of Punjab*[12] has held as under: (AIR pp. 640-42, paras 7 & 8)

> 7. … An accomplice is undoubtedly a competent witness under the Evidence Act, 1872. There can be, however, no doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence.
>
> It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true.
>
> But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.
>
> In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be

applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.

* * *

8. … Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts.

[22] Further, in *Ravinder Singh v. State of Haryana*[13], this court, while considering the approver's testimony within the meaning of s. 133 of the Evidence Act, 1872 has observed: (SCC pp. 747-48, para 12)

12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. … Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based.

[23] In *Abdul Sattar v. UT, Chandigarh*[14] where the prosecution had sought to prove its case by relying upon the evidence of the approver, it was held that: (SCC p. 602, para. 6)

6. … The approver is a competent witness but the position in law is fairly well settled that on the uncorroborated testimony of the approver it would be risky to base the conviction, particularly in respect of a serious charge like murder.

A Once the evidence of the approver is found to be not reliable, the worth of his evidence is lost and such evidence, even by seeking corroboration, cannot be made the foundation of a conviction. The abovesaid *ratio* has been reaffirmed and reiterated by this court in *Suresh Chandra Bahri v. State of Bihar*[15], *Ramprasad v. State*
B *of Maharashtra*[16] and *Narayan Chetanram Chaudhary v. State of Maharashtra*[17].

[24] In *Narayan Chetanram Chaudhary*[17] it was further held that: (SCC p. 479, para. 37)

C

> 37. For corroborative evidence, the court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in
> D the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable.

[25] Similar question again came up for consideration before this court in *K Hashim v. State of TN*[18] and *Sitaram Sao v. State of*
E *Jharkhand*[19], wherein this court has held that: (*K Hashim* case[18], SCC p. 247, para. 26)

> 26. Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness and the conviction is not illegal
> F merely because it proceeds on an uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this section has to be read along with Section 114 Illustration (b). The latter section empowers the court to presume the existence of certain facts and the illustration elucidates what the court may presume and makes clear by means
> G of examples as to what facts the court shall have regard to in considering whether or not the maxims illustrated apply to a given case. Illustration (b) in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. The statute permits the conviction of an accused on
> H the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in Illustration (b) to Section 114 of the Evidence Act strikes a note of warning cautioning the court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration is a matter of prudence except
> I when it is safe to dispense with such corroboration must be clearly present in the mind of the Judge.

[26] In *Sheshanna Bhumanna Yadav v. State of Maharashtra*[20] the test of reliability of the approver's evidence and rule as to corroboration was discussed. The following discussion and conclusion are relevant which read as under: (SCC pp. 125-26, paras. 12 & 13)

> 12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114, Illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is, any party to the crime charged and someone who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars, it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.
>
> 13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh v. State of Punjab*[12] and the recent decision is *Lachhi Ram v. State of Punjab*[21]. In *Sarwan Singh* case[12] this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in *Lachhi Ram* case[21] said that the first test of reliability of approver and accomplice evidence was for the court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability, corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime.

[27] In *Dagdu v. State of Maharashtra*[22] the scope of s. 133 and Illustration (b) to s. 114 of the Evidence Act, 1872 and nature of rule of corroboration of accomplice evidence was explained by a three-Judge Bench of this court in the following manner: (SCC p. 76, paras. 24-25)

> 24. In *Bhuboni Sahu v. R*[23] the Privy Council after noticing Section 133 and Illustration (b) to Section 114 of the Evidence Act observed that whilst it is not illegal to act on the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The rule of prudence was based on the interpretation of the phrase 'corroborated in material particulars' in Illustration (b). Delivering the judgment of the Judicial Committee, Sir John Beaumont observed that the danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence and the story may be true in all its details as to eight of them but untrue as to the other two whose names may have been introduced because they are enemies of the approver. The only real safeguard therefore against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates each accused.
>
> 25. This Court has in a series of cases expressed the same view as regards accomplice evidence. (See *State of Bihar v. Basawan Singh*[24]; *Haricharan Kurmi v. State of Bihar*[25] ; *Haroon Haji Abdulla v. State of Maharashtra*[26] and *Ravinder Singh v. State of Haryana*[13].) In *Haricharan*[25] Gajendragadkar, C.J., speaking for a five-Judge Bench observed that the testimony of an accomplice is evidence under Section 3 of the Evidence Act and has to be dealt with as such. The evidence is of a tainted character and as such is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars.

[28] In *Rampal Pithwa Rahidas v. State of Maharashtra*[27], while considering the very same provisions, this court has held that the approver's evidence must be corroborated in material particulars by direct or circumstantial evidence. This court further held that while considering credibility of the approver and weight to be attached to his statement, the statement made in bail application of the approver can be looked into by the court.

[29] It is clear that once the evidence of the approver is held to be trustworthy, it must be shown that the story given by him so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and is not merely a rule of law. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence.

[30] Keeping the legal principles enunciated by this court in respect of interference by the appellate court in case of acquittal by the trial court and evidentiary value of "approver"/ "accomplice", let us discuss the oral and documentary evidence led in by the prosecution and the defence.

Approver's (PW 6's) Evidence

[31] One Ratan Sukladas s/o Prafullya Sukladas, originally charged as accused 12, after tendering pardon was examined as PW 6 on the side of the prosecution. Mr Sidharth Luthra, learned Senior Counsel for the appellants submitted that in as much as PW 6 waited for four years to change his mind and sought pardon for his action, his statement is not reliable and the courts below ought to have rejected his testimony. In order to appreciate the said contention, it is useful to refer the relevant provisions of the Code relating to tender of pardon and power to direct tender of pardon to approver/ accomplice.

[32] Sections 306 and 307 of the Code read as under:

> 306. Tender of pardon to accomplice. (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the First Class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full

A and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) * * *

B

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record:

(a) his reasons for so doing;

C (b) whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

D (4) Every person accepting a tender of pardon made under sub-section (1):

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

E

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub section (1) and has been examined under sub-section F (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case:

(a) commit it for trial:

(i) to the Court of Session if the offence is triable G exclusively by that court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that court;

H

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon - At any time after commitment of a case but before judgment is passed, the court I to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

[33] The principle of tendering pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. The object of s. 306 of the Code of Criminal Procedure, 1973 (in short "the Code") is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. This section empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. Under s. 306 of the Code, the Magistrate of the First Class is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 of the Code vests the court to which the commitment is made, with power to tender a pardon to an accomplice.

[34] An accomplice who has been granted pardon under s. 306 or s. 307 of the Code gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under s. 308 of the Code to that effect, the protection given to him can be lifted. Section 306(4) makes it clear that the person accepting a tender of pardon should be examined as a witness first in the Court of the Magistrate and subsequently in the trial court. Once an accused is granted pardon under s. 306, he ceases to be an accused and becomes witness for the prosecution.

[35] Regarding the delay in tendering pardon, it is not in dispute that the trial commenced on 11 March 2003 with the examination of prosecution witnesses. The approver, PW 6, submitted his application to become an approver on 16 June 2004 well before the judgment which was delivered on 19 April 2005. We have already quoted s. 307 of the Code which denotes that pardon can be tendered at any time after commitment of a case but before the judgment is pronounced. In view of the same, inasmuch as the approver submitted his application well before the judgment was delivered ie, on 19 April 2005, the contention regarding delay on the part of PW 6 is liable to be rejected.

[36] It is also not in dispute that initially, PW 6 was one of the 13 accused persons charged with the offence of murder and in the array of accused, he was shown as A-12. Accordingly, the prosecution is justified in taking the stand that the approver (PW 6) was directly or indirectly concerned in or privy to the offence of murder. In view of the same and in the light of the language used in s. 307 of the Code, the courts below are right in entertaining the evidence of PW 6 as approver. As regards the condition prescribed in s. 306 of the Code that the approver must make a full and true disclosure of the whole of the circumstances, let us analyse his statement whether he complied with the abovesaid requirement.

[37] In his examination-in-chief, PW 6 had clearly stated that he was one of the accused in the case and during investigation he was arrested by the police. On completion of investigation, the investigating agency submitted charge-sheet against him along with others for trial. In categorical terms, he asserted that he was aware of the whole incident which led to the killing of Tapan Chakraborty and also asserted that he was also connected with and involved in his murder along with others.

[38] PW 6 highlighted that on 21 August 2000, there was a public meeting organised by CPI(M) Party at Santinagar. The deceased, Tapan Chakraborty and other party leaders attended the said meeting. In the year 2000, there was a student agitation at Ratia Ferry Ghat against kidnapping of three students and one labourer by the extremists. On this issue, the students had blocked the road. The deceased Tapan Chakraborty, being the local leader of the CPI(M) Party, resisted the students in making agitation and blocking up the road. For that matter, PW 6 along with the other accused developed a grudge in their minds to give Tapan

Chakraborty a good lesson. On 30 August 2000, at about 7/8pm, a meeting was convened in the house of the accused Tapan Das (A-5). All the accused persons including PW 6 were present in the said meeting wherein it was decided to eliminate Tapan Chakraborty as he stood against the students' movement.

[39] PW 6 further highlighted that two days back, prior to holding of meeting on 30 August 2000, they saw posters hanging on the walls that a meeting of CPI(M) would be held at Santinagar on 31 August 2000 at 3pm where Ramakanta Paul (PW 10) and Tapan Chakraborty would remain present. To materialise the plan chalked out in the meeting held on 30 August 2000, 13 persons including PW 6 had spread over in different groups in different places to eliminate Tapan Chakraborty. Uttam Shil (A-8) was deputed on the other side of the river to let them informed when Tapan Chakraborty would be proceeding towards Bagan Bazar on conclusion of meeting. Radha Kant Das (A-13), Ashim Bhattacharjee (A-2), Bikash Das (A-6), Mrinal Das (A 4), Shailendra Das (A-3) and PW 6 were waiting at Bagan Bazar. Another group of persons consisting of Tapan Das (A-5), Gautam Das (A 11), Somesh Das (A-7), Pradip Das (A-9) were waiting in the house of Anil Das (A-1). All were keeping watch and observing the situation till 4pm. Around 6pm, they were informed by Anil Das (A-1) that the meeting at Santinagar had been over and the participants of the said meeting had started for the ferry ghat to cross the river.

[40] The persons assembled in the house of Anil Das (A-1) started for ferry ghat. On seeing them, another group including PW 6 waiting at Bagan Bazar also followed them. All the aforesaid 13 persons reached the ferry ghat around 6.15pm. After reaching there, they found the boat carrying Tapan Chakraborty, Ramakanta Paul, PW 10 and 9/10 other persons in the middle of the river. As soon as Tapan Chakraborty and others got down from the boat, one of the accused shouted to attack him. While Tapan Chakraborty was washing his feet in the river water, suddenly, PW 6 caught hold of him and dragged him down on the side of the river. He fell on the ground with his back side up. At that point of time, Tapan Das (A-5) and Gautam Das (A 11) fired two rounds of bullets from their pistols at Tapan Chakraborty. Simultaneously, a bomb had exploded on the other side of the river. The witnesses who were waiting in the passenger shed to escort the victim rushed to the place of occurrence. On seeing

A them, all the assailants fled towards the south-east direction. PW 6 crossed the river along with others taking the route of Ratia to conceal themselves. They were advised by Tapan Das (A-5) and Gautam Das (A-11) to keep themselves confined in their respective houses. On the following day, PW 6 came to know
B from local news broadcasted by the All India Radio that Tapan Chakraborty died following the gunshots.

[41] Regarding his change of mind, PW 6 explained that he became perplexed by the death of Tapan Chakraborty. He further
C explained that out of repentance, he once made an attempt to commit suicide by hanging himself at his residence in the middle of the month of March 2004. Thereafter, he decided to divulge the whole incident leading to the killing of Tapan Chakraborty before the court. He also asserted that he had decided to disclose
D the whole incident voluntarily on the advise of the members of his family. He identified all the accused persons in the court by name and face.

[42] In the cross-examination, PW 6 deposed that the police
E arrested him in connection with this case one day after the occurrence. He was in police custody for eight days and, thereafter, on expiry of police remand, he was granted bail. He asserted that during his stay in police custody, he was not interrogated by police. About his change of mind, in cross-
F examination, he explained that since 31 August 2000 till mid of March 2004, he had been running amok. During the aforesaid intervening period, he did not meet any people to express his mental agony. He also asserted that he lost his mental peace as the murder of Tapan Chakraborty had taken place before his own eyes and he was also directly involved in his killing. He denied that
G he deposed falsely. He also denied that he was provoked by the CPI(M) Party that if he turns to be an approver, he would be given a suitable job.

[43] A reading of the entire evidence of PW 6 makes it clear that
H the reason for change of his mind for tendering pardon is acceptable and in tune with the conditions prescribed in ss. 306 and 307 of the Code. The trial judge, who had the liberty of noting his appearance and recorded his evidence, believed his version which was rightly accepted by the High Court. On going
I through his entire evidence, the conditions stated in ss. 306 and

307 of the Code are fully complied with and we accept his statement and concur with the decision arrived at by the courts below.

Corroborative Evidence With Regard To The Statement Of Approver PW 6

[44] In the FIR, the following persons have been named as accused relating to the occurrence, namely, Anil Das (A-1), Ashim Bhattacharjee (A 2), Shailendra Das (A-3), Mrinal Das (A-4), Tapan Das (A-5), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10), Gautam Das (A-11), Ratan Sukladas (A-12) (turned approver) and Radha Kant Das (A-13).

[45] Ratan Sukladas who turned an "approver" and was examined as PW 6, named all the 13 accused (including himself). He mentioned the following persons as accused, namely, Anil Das (A-1), Ashim Bhattacharjee (A-2), Shailendra Das (A-3), Mrinal Das (A-4), Tapan Das (A-5), Bikash Das (A-6), Somesh Das (A-7), Uttam Shil (A-8), Pradip Das (A-9), Subal Deb (A-10), Gautam Das (A-11) and Radha Kant Das (A-13).

[46] Among the 13 accused, we are concerned only with Tapan Das (A-5) and Gautam Das (A-11) in these appeals, who were convicted by the trial court and their conviction was confirmed by the High Court and Somesh Das (A-7), Mrinal Das (A-4) and Anil Das (A-1), who were acquitted by the trial court and convicted by the High Court. Except the abovementioned five accused persons, we are not concerned with others. Tapan Das (A-5) was identified by Babul Dey (PW 1), Nehar Ranjan Deb (PW 4), Bidhu Urang (PW 7) and Pranab Chakraborty (PW 8). Somesh Das (A-7) was identified by Babul Dey (PW 1) and Bidhu Urang (PW 7). Mrinal Das (A-4) was identified by Babul Dey (PW 1) and Nehar Ranjan Deb (PW 4). Anil Das (A-1) was identified by Nehar Ranjan Deb (PW 4) and Pranab Chakraborty (PW 8). Gautam Das (A 11) was identified by Babul Dey (PW 1), Nehar Ranjan Deb (PW 4), Bidhu Urang (PW 7) and Pranab Chakraborty (PW 8). Though Pradip Das (A-9) was identified by Babul Dey (PW 1), Nehar Ranjan Deb (PW 4), Bidhu Urang (PW 7) and Pranab Chakraborty (PW 8), in as much as his name has been deleted from the array of the appellants *vide* this court's order dated 16 September 2009, there is no need to consider his case in these appeals.

[47] Now let us analyse the witnesses relied on by the prosecution.

Eyewitnesses In The Boat

[48] Babul Dey, PW 1 identified Somesh Das (A-7), Mrinal Das (A-4), Tapan Das (A-5), Gautam Das (A-11), Ashim Bhattacharjee (A-2), Subal Deb (A-10), Shailendra Das (A-3) and Pradip Das (A-9). In his evidence, he deposed that Tapan Chakraborty, the deceased, was known to him. He admitted that he belongs to DYFI, which is the youth wing of CPI(M) Party. The deceased was the Vice-Chairman of Kalyanpur Block and was also the Secretary of DYFI. He explained that a meeting was held at Durgapur on 31 August 2000 which was started at 3pm and completed at 5pm. He along with Tapan Chakraborty attended the said meeting. After completion of the meeting, all the participants including him left for Kalyanpur by crossing the river by a boat. At around 6pm, after crossing the river, when Tapan Chakraborty was washing his feet in the river water, some miscreants pushed him and they were also using abusive language towards him. They opened gunfire in the air. On seeing this, he along with others fled to the retiring shed nearby the river where some members of the party were waiting for them. He also noticed that the assailants were running towards north and they were 15/16 in number. When he along with others returned to the place of occurrence, they found Tapan Chakraborty lying on the ground in injured condition. They took Tapan Chakraborty to Kalyanpur Hospital in a mobile police van. On the advise of the doctors, Tapan Chakraborty was shifted to GB Hospital, Agartala.

[49] PW 1 admitted that he did not go to GB Hospital. However, he came to learn that on the way to GB Hospital, Tapan Chakraborty succumbed to his injuries. He along with Ramakanta Paul (PW 10) and others then went to their party office and discussed the matter and decided to lodge a complaint to the police. Accordingly, their Secretary, Sunil Deb scribed an *ejahar* as per the version of PW 1 and after writing the same, he read over the same to him and after satisfying that it was written as per his version, he put his signature therein. In the witness box, he identified his signature which was marked as ext. 1. He also informed the court that the accused persons were the supporters of Congress (I) Party. He also clarified that two of the miscreants were supporters of Amara Bengali Party.

[50] Babul Dey was examined as PW 1. In his evidence, he narrated the entire events commencing from conspiracy ending with gunshot on the deceased Tapan Chakraborty. Though it was pointed out that he had not stated all the abovementioned details in the complaint, on going through the same, we are satisfied that all relevant details have been stated in the complaint and the omission to mention is only negligible.

[51] Likewise, it was commended by the counsel for the appellants that though there were some police personnel in the police mobile van, PW 1 did not disclose the incident to any of those police officials travelling in the said vehicle. For this, PW 1 has explained that they took the injured to Kalyanpur Hospital first and later on, in association with his party supporters, he lodged a complaint. In such a situation, it is but natural that the person who received gunshot injury has to be admitted in the hospital and only thereafter anybody could think of the next step including making a complaint to the police. We are satisfied that there is no infirmity in the conduct of PW 1 in not conveying anything to the police personnel in the mobile van and even his interaction with his party colleagues. PW 1 has also admitted that Tapan Chakraborty was the Secretary of DYFI, because of which it was argued that due to political rivalry, he had falsely implicated the accused persons. In view of the above discussion, we are not impressed upon such objection and reject the same.

[52] The other eyewitness is Nitai Das (PW 3), who was in the boat. It was he who identified Ratan Sukladas (A-12), Radha Kant Das (A-13) and Bikash Das (A-6) as the members of attacking group. He also admitted that the deceased Tapan Chakraborty was known to him. Like PW 1, he also explained that the meeting was held at Santinagar between 3pm to 5.45pm He along with Tapan Chakraborty and others reached Santinagar through the ferry ghat. They crossed the river by boat and got down on the other side of the river and in that process, according to him, he heard the sound of gunshot and simultaneously a bomb was hurled from the other side of the river. Due to fear, they fled to a distance of ten cubits from the place of occurrence and some people who were waiting in the passenger shed rushed to the spot.

[53] When PW 3 along with others returned to the place of occurrence, he found Tapan Chakraborty lying on the ground in injured condition. Apart from three persons mentioned above, he also stated that about 10/12 persons attacked Tapan Chakraborty. The miscreants, after commission of offence, fled towards south-east direction. Thereafter, they took him to Kalyanpur Hospital in a police van. He was examined by the IO on the same night, that is, at about 9pm, to whom also he disclosed the names of the abovesaid accused persons. There is no contradiction with regard to the identification of the said three assailants. Though the counsel for the appellants has pointed out certain omissions, on going through the same, we are satisfied that these omissions were not at all material and the High Court has rightly relied on and accepted his evidence.

[54] Apart from eyewitnesses PW 1 and PW 3, another eyewitness Benu Ranjan Dhupi (PW 11) was also present in the boat. According to him, on the fateful day, that is, on 31 August 2000 around 3pm, he met Tapan Chakraborty at Bagan Bazar who requested him to go to Santinagar well ahead in connection with peace meeting to be held there and to supervise and see that everything was in order. According to him, as directed by Tapan Chakraborty, he reached Santinagar at 3pm. He mentioned that Uttam Shil (A-8) enquired from him whether Tapan Chakraborty would attend the meeting. After concluding the meeting, Tapan Chakraborty and others including PW 11 got into the boat to cross the river. While he was getting down from the boat, he heard hue and cry and someone saying "attack them attack them". He also heard a sound of explosion of bomb on the other side of the river and the sound of two rounds of fire. Thereafter, he fled from the spot due to fear.

[55] According to PW 11, after ten days of the aforesaid occurrence, he met Ramakanta Paul (PW 10) at Bagan Bazar. His evidence shows that he was also in the boat, however, he only mentioned that accused Uttam Shil (A 8) was found near the venue of the meeting and he narrated about the enquiry made by him whether Tapan Chakraborty would attend the meeting. Even, according to him, the said Uttam Shil (A-8) had disappeared from the place of meeting.

[56] The other three persons in the boat were Ganesh Kol (PW 2), Ramakanta Paul (PW 10) and Prabir Biswas (PW 12). No doubt, all the three witnesses turned hostile since they refused to identify the assailants before the court at the instance of the prosecution. However, as rightly observed by the High Court, they testified to the other parts of the occurrence supporting the prosecution case that on the said date and time, a group of miscreants had done to death the victim Tapan Chakraborty. Though, their evidence may not be fully supportable to the prosecution case, however, as observed by the High Court, it is clear from their statements that they accompanied the deceased in the same boat and corroborated with other witnesses with regard to the *factum* of murder though they did not identify the persons concerned. It is settled position of law that the evidence of hostile witnesses need not be rejected in its entirety but may be relied on for corroboration.

Eyewitnesses In The Passenger Shed

[57] Now, let us discuss the eyewitnesses who were present in the passenger shed. The four eyewitnesses, namely, Nehar Ranjan Deb (PW 4), Bidhu Urang (PW 7), Pranab Chakraborty (PW 8) and Satyendra Tanti (PW 9) were waiting in the passenger shed on the opposite bank of the river and when the assailants had attacked the victim all of a sudden, they rushed to the spot. In his evidence, Nehar Ranjan Deb (PW 4) admitted that Tapan Chakraborty was known to him and he was his maternal uncle. He was the Vice-Chairman of Kalyanpur Panchayat Society. On 31 August 2000, in the evening, at around 6.30pm, he went to a tea stall at Bagan Bazar and found Pranab Chakraborty (PW 8), younger brother of Tapan Chakraborty. Pranab Chakraborty told him that Tapan had gone to Santinagar to attend a meeting. He requested him to accompany him to the ferry ghat for escorting Tapan Chakraborty as he was running a risk of his life because of some untoward incident which took place in his house. Satyendra Tanti (PW 9) and Bidhu Urang (PW 7) also accompanied them.

[58] PW 4 further explained that they reached the ferry ghat at around 5.45pm and took shelter in the passenger shed as, at that time, it was drizzling. According to him, while they were waiting in the passenger shed, he had noticed Anil Das (A-1) proceeding hurriedly towards Bagan Bazar from the side of ferry ghat. After 5/7 minutes, he had seen about ten youths proceeding towards

A ferry ghat from the direction of Bagan Bazar. He mentioned the name of four persons, namely, Gautam Das (A-11), Pradip Das (A-9), Tapan Das (A-5) and Mrinal Das (A-4) who were among the youths. Those persons were waiting in the ferry ghat. The distance of ferry ghat from the passenger shed would be 100 B cubits. He noticed Tapan Chakraborty and others getting down from the boat and as soon as they got down, the miscreants dragged Tapan Chakraborty. All the persons in the passenger shed proceeded towards ferry ghat, at that time, they also heard the sound of bursting of bomb as well as sound of gunfire. They C became frightened and retreated for a while, thereafter, they proceeded towards ferry ghat. After reaching there, they found Tapan Chakraborty lying on the ground with injuries. They lifted him and brought him on the main road and with the help of a police mobile van they took him to Kalyanpur Hospital. However, D he admitted that he did not accompany them. He asserted that after the commission of offence the miscreants fled towards south. In cross examination, he admitted that the deceased was forefront leader of the CPI(M) Party. He denied the suggestion that the murder of Tapan Chakraborty was the result of inter-party rivalry.

E

[59] Next witness who was present in the passenger shed was Bidhu Urang, examined as PW 7. In his examination-in-chief, he stated that Tapan Chakraborty was murdered on 31 August 2000 by some miscreants belonging to UBLF extremist group. He was F killed at Santinagar Ferry Ghat at around 6.30pm and according to him at the time of occurrence, he was sitting in the passenger shed which is about 100 cubits away from the place of occurrence. He also mentioned that besides him Pranab Chakraborty (PW 8), Nehar Ranjan Deb (PW 4) and Satyendra G Tanti (PW 9) were also present there. He also admitted that at that time it was drizzling. In order to protect themselves from the rain, they took shelter in the passenger shed at around 5.30pm.

[60] PW 7 also stated in the examination-in-chief about the H meeting at Santinagar and explained that the deceased Tapan Chakraborty went to Santinagar to attend that peace meeting organised by DYFI. He further explained that he along with others went to Santinagar to escort Tapan Chakraborty. Like, PW 4, he also narrated that while he was sitting in the passenger shed, he saw a group of 12/14 persons proceeding towards I Santinagar Ferry Ghat, out of which, he recognised Tapan Das

(A-5), Gautam Das (A-11), Pradip Das (A-9) and Somesh Das (A-7). At about 6.30pm, according to him, he noticed that Tapan Chakraborty accompanied by about 15 persons was crossing the river in a boat. One Ramakant Paul (PW 10) was one of the 15 persons who accompanied Tapan Chakraborty. Suddenly, he heard the sound of two gunshots and immediately when he looked forward, he saw a group of persons running away towards south-east direction. At once, he along with his companions rushed to the ferry ghat and found Tapan Chakraborty in injured condition. They carried him up to main road and then they took him in a police mobile van. He asserted that the group of persons who were found running away from the ferry ghat was the same which he saw earlier proceeding towards the ferry ghat from Bagan Bazar.

[61] PW 7 informed the court that on 31 August 2000, at around 10.30pm one police officer seized bloodstained earth from Santinagar Ferry Ghat in his presence and drew seizure list wherein he signed. He admitted his signature found in the seizure list which was marked as ext. 3. One Sujit Das also signed the seizure list along with him. He asserted that any two persons of the group fired two shots on Tapan Chakraborty. He also informed the court that before he heard the sound of firing, he saw a flash of fire within the circle comprising 12/14 persons. The accused persons, namely, Pradip Das (A-9), Tapan Das (A-5), Somesh Das (A-7) and Gautam Das (A-11) were identified in court by name and face by PW 7. In cross examination, it is true that he informed the court that he does not know any person named Ratan Sukladas (PW 6), the approver.

[62] One Pranab Chakraborty was examined as PW 8. He was one of the persons waiting in the passenger shed at the relevant time. He admitted that Tapan Chakraborty was his eldest brother. According to him, prior to his death, he held many responsible posts in CPI(M) Party. Besides, he was the Vice-Chairman of Kalyanpur Panchayat Society. He informed the court that on 31 August 2000, his brother was killed by the miscreants at Santinagar Ferry Ghat. According to him, on that day, around 5.15 p.m., Bidhu Urang (PW 7), Nehar Ranjan Deb (PW 4), Satyendra Tanti (PW 9) and he himself were sitting in the passenger shed which is about 100 cubits away from Santinagar Ferry Ghat. PW 8 also deposed that they were waiting in the

A passenger shed to escort his brother who was supposed to return from Santinagar after attending a peace meeting. He explained that from Bagan Bazar, they went straight to the passenger shed. He also stated that there was security threat to the life of his brother because of which they used to accompany and escort him
B whenever he went outside in connection with any party work. When they were waiting in the passenger shed, it was drizzling and at that time they saw a good number of persons proceeding towards ferry ghat, out of them he recognised Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9) and Anil Das (A-1). He
C saw Anil Das (A-1) coming hurriedly from the other side of the river.

[63] PW 8 deposed that, as soon as Tapan Chakraborty reached near the bank of the river he heard hue and cry and at that time
D he also heard sound of two rounds of fire. Thereafter, they rushed to the place of occurrence, and then the miscreants ran away towards south-east direction. On arriving at the place of occurrence, he found Tapan lying on the ground with his face upside down with two bullet injuries one on the left side of his
E back and another on the back of his head. The wounds were bleeding profusely. With the help of others, he took his brother up to the main road and thereafter took him to the hospital in a police van. As the condition of his brother was alarming, he was shifted to GB Hospital, Agartala from Kalyanpur Hospital. He
F identified Anil Das (A-1), Pradip Das (A-9), Gautam Das (A-11) in court by name and face. In cross-examination, he denied the suggestion that he could not recognise Tapan Das (A-5), Pradip Das (A-9) and Gautam Das (A-11). He also mentioned that Ramakanta Paul (PW 10), Prabir Biswas (PW 12), Nilai Das (PW
G 3), Benu Ranjan Dhupi (PW 11), Sujit Das, Subrata Das and Rajesh Das were in the boat along with his brother while crossing the river.

[64] Another witness from the passenger shed was Satyendra
H Tanti (PW 9). Like other witnesses, namely, PWs 4, 7 and 8, he also explained the said incident. He admitted that Tapan Chakraborty was the Vice-Chairman, Kalyanpur Panchayat Society and held several responsible posts in the CPI(M) Party. He also admitted that Tapan was related to his family. Since, he informed
I the court that he did not notice any of the persons while coming out of the passenger shed, he was declared as a hostile witness

from the side of the prosecution. Though PW 9 turned hostile as stated earlier, he admitted that he along with Pranab Chakraborty (PW 8), Nehar Ranjan Deb (PW 4) and Bidhu Urang (PW 7) were sitting in the passenger shed with a view to escort his brother Tapan Chakraborty.

[65] The analysis of statements of various persons, particularly, the eyewitnesses clearly strengthens the case of PW 6, the approver, in all aspects including conspiracy, planning to attack the deceased for his statement about the students' movement, actual incident, role played by the assailants and subsequent events after the gunshot till the death of the deceased Tapan Chakraborty. We are satisfied that by these statements, the prosecution has strengthened its case through PW 6, the approver and there is no reason to disbelieve his version.

Reliance On The Hostile Witness

[66] In the case on hand Ganesh Kol (PW 2), Satyendra Tanti (PW 9), Ramakanta Paul (PW 10) and Prabhir Biswas (PW 12) were declared as hostile witnesses.

[67] It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting *en bloc* the evidence of the witness. However, the court has to be very careful, as *prima facie*, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

A **[68]** In our case, the eyewitnesses including the hostile witnesses, firmly established the prosecution version. Five eyewitnesses, namely, PW 1, PW 4, PW 6, PW 7 and PW 8 clearly identified two convicts, appellants Tapan Das (A-5) and Gautam Das (A-11). PWs 1, 4, 7 and 8 identified accused Pradip Das (A-9). PWs
B 1 and 7 identified accused Somesh Das (A-7). PWs 1 and 4 identified Mrinal Das (A-4). PWs 4 and 8 identified Anil Das (A-1). It is clear that six accused persons including two convicts/ appellants had been identified by more than one eyewitnesses. It is also clear that six accused could have been identified by the
C eyewitnesses though all of them could not have been identified by the same assailants. However, it is clear that two or more than two eyewitnesses could identify one or more than one assailants. The general principle of appreciating evidence of eyewitnesses in such a case is that where a large number of offenders are
D involved, it is necessary for the court to seek corroboration, at least, from two or more witnesses as a measure of caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eyewitnesses is less than two.

E

[69] It is well settled that in a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. In other words, in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence.

F

[70] As rightly observed by the High Court, there are only six accused persons, namely, Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9), Mrinal Das (A-4), Somesh Das (A-7) and Anil Das (A-1) identified by two or more eyewitnesses while Tapan Das (A 5) and Gautam Das (A-11) were recognised by PWs 1,
G 4, 7 and 8 corroborated by PW 6 (approver). Somesh Das (A-7) was recognised by PWs 1 and 7, Mrinal Das (A-4) by PWs 1 and 4 and Anil Das (A-1) by PWs 4 and 8, all of them being corroborated by PW 6 (approver). If PW 6 (approver) is included,
H there are three eyewitnesses who could identify six offenders including two convicts/appellants. In as much as we were taken through the entire evidence of the abovementioned witnesses, we fully endorse the view expressed by the High Court.

I

[71] Now we have to find out whether the High Court is justified in interfering with the order of acquittal in so far as accused Anil Das (A-1), Mrinal Das (A-4), Somesh Das (A-7) and Pradip Das (A-9) are concerned, in the light of the principles which we have explained in the earlier part of our judgment. The trial court, after finding that the *factum* of conspiracy as disclosed by the approver remains unsubstantiated for want of independent corroborating evidence, acquitted them. Since the High Court has reversed the said decision of acquittal and convicted the accused persons relying on s. 34 IPC, let us find out whether the High Court is justified in upsetting the order of acquittal into conviction.

[72] Section 34 IPC reads as under:

> 34. Acts done by several persons in furtherance of common intention. - When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The reading of the above provision makes it clear that the burden lies on the prosecution to prove that the actual participation of more than one person for commission of criminal act was done in furtherance of common intention at a prior concept. Further, where the evidence did not establish that particular accused has dealt blow the liability would devolve on others also who were involved with common intention and such conviction in those cases are not sustainable.

[73] A clear distinction made out between common intention and common object is that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is substantial difference between the two sections, namely, ss. 34 and 149 IPC, to some extent they also overlap and it is a question to be determined on the facts of each case.

[74] There is no bar in convicting the accused under substantive section read with s. 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all. It is also settled position that in order to convict a person vicariously liable under s. 34 or s. 149 IPC, it is not necessary to prove that

each and every one of them had indulged in overt acts in order to apply s. 34, apart from the fact that there should be two or more accused. Two facts must be established, namely, (a) common intention, (b) participation of accused in the commission of an offence. It requires a prearranged plan and presupposes prior concept. Therefore, there must be prior meeting of minds. It can also be developed on the spur of the moment but there must be prearrangement or premeditated concept.

[75] As rightly observed by the High Court, though the trial court was of the view that the evidence of an approver contains full and correct version of the incident so far as participation of the accused Tapan Das (A-5) and Gautam Das (A-11), however, there is no plausible reason by the trial court as to why the other part of the statement of the approver could not be believed.

[76] We have already pointed out that in order to seek the aid of s. 34 IPC, it is not necessary that individual act of the accused persons has to be proved by the prosecution by direct evidence. Again, as mentioned above, common intention has to be inferred from proved facts and circumstances and once there exists common intention, mere presence of the accused persons among the assailants would be sufficient proof of their participation in the offence. We agree with the conclusion of the High Court that the trial court failed to explain or adduce sufficient reasons as to why the other part of the evidence that the accused persons named by the approver were found present in the place of occurrence could not be believed for the purpose of invoking s. 34 when two or more eyewitnesses corroborated the testimony of the approver (PW 6) specifically naming six accused persons including the two convicted appellants.

[77] The existence of common intention amongst the participants in the crime is the essential element for application of s. 34 and it is not necessary that the acts of several persons charged with the commission of an offence jointly must be the same or identically similar. We have already pointed out from the evidence of eyewitnesses as well as the approver (PW 6) that one Uttam Shil (A-8) was deployed at the place of meeting at Santinagar for the purpose of giving intimation to other accused persons about the movement of the deceased. It is also seen from the evidence that one more accused was stationed on the shore of the river near

Bagan Bazar. It is also seen from the evidence that after the meeting, when the boat carrying Tapan Chakraborty and other eyewitnesses was about to reach Bagan Bazar shore, accused Anil Das (A-1) who was deployed there suddenly left towards Bagan Bazar and within few minutes ten accused persons rushed to the boat from Bagan Bazar. Thereafter, the occurrence took place. From the materials placed by the prosecution, particularly, from the eyewitnesses, the common intention can be inferred among the accused persons including the six persons identified by the eyewitnesses.

[78] If we consider the case of the prosecution in the light of the disclosure made by the approver (PW 6), coupled with the statement of eyewitnesses, it is clear that the 13 assailants had planned and remained present on the shore of the river to eliminate Tapan Chakraborty. In view of these materials, the High Court is right in applying Section 34 IPC and basing conviction of six accused persons including the two convicted appellants, that is, Tapan Das (A-5), Gautam Das (A-11), Pradip Das (A-9), Somesh Das (A-7), Mrinal Das (A-4) and Anil Das (A-1).

Medical Evidence

[79] The doctor who conducted the post-mortem on the dead body was examined as PW 14 and his report has been marked as ext. 7. The said report shows three firearm wounds on the dead body of the deceased. One, measuring 0.75 cm in radius over upper part of left anterior chest wall at posterior auxiliary plane; two, lacerated injury 3 cm × .5 cm × bone-deep occipital region; and three, lacerated injury 4 cm × 1 cm × bone-deep over occipital region of skull. PW 14 has categorically stated that the first injury was sustained by the deceased on his back. According to him, injuries two and three might be received by the deceased by the same bullet if the bullet had split. We also verified the post-mortem examination report (ext. 7) and the medical evidence of PW 14 and find no inconsistency between the contents in his report (ext. 7), his evidence as PW 14 and the ocular evidence of the approver (PW 6). As rightly observed by the trial court and the High Court, the ocular version ie, evidence of the approver (PW 6) stands corroborated by the medical evidence of PW 14 and ext. 7. We concur with the said conclusion.

[80] Though Mr Sidharth Luthra, learned Senior Counsel appearing for the appellants pointed out certain contradictions in the statement of witnesses with their previous statements recorded during investigation and with all their statements in court, on verification, we are satisfied that those contradictions, if any, are only minimal and would not affect the claim of the prosecution case. We have already discussed elaborately about the identification of the assailants by the prosecution witnesses including the approver (PW 6). Though it was pointed out by the learned Senior Counsel for the appellants that none of the seven witnesses other than the approver (PW 6) could recognise all the assailants, in the earlier paragraphs, we have pointed out that each witness identified at least two assailants and the approver (PW 6) has identified all of them. In a case of this nature where large number of persons committed the crime, it is but natural that due to fear and confusion a witness cannot recognise and remember all the assailants. If any witness furnishes all the details accurately, in that event also, it is the duty of the court to verify his version carefully.

Conclusion

[81] As discussed earlier, the statement of the approver (PW 6) inspires confidence including the conspiracy part which gets full support from the narration of the occurrence given by the eyewitnesses, more particularly, as to the deployment of some of the offenders for reporting to others about the movement of the victim. As rightly pointed out by the High Court, there is nothing wrong in accepting his entire statement and true disclosure of the incident coupled with corroboration of his evidence with the eyewitnesses. We fully agree with the discussion and ultimate conclusion arrived at by the High Court and are unable to accept any of the contentions raised by the learned Senior Counsel for the appellants.

[82] Under these circumstances, we confirm the ultimate decision arrived at by the High Court. Consequently, both the appeals fail and are accordingly dismissed as devoid of any merit.

Endnotes:

1. (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162
2. (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325
3. (2009) 17 SCC 405 : (2011) 1 SCC (Cri) 1040
4. (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385
5. (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179
6. (2010) 12 SCC 59 : (2011) 1 SCC (Cri) 309
7. (2010) 13 SCC 657 : (2011) 2 SCC (Cri) 375
8. (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216
9. (2011) 4 SCC 786 : (2011) 2 SCC (Cri) 493
10. AIR 1963 SC 599 : (1963) 1 Cri LJ 489 : (1963) 3 SCR 830
11. (1969) 3 SCC 429 : 1970 SCC (Cri) 99
12. AIR 1957 SC 637 : 1957 Cri LJ 1014 : 1957 SCR 953
13. (1975) 3 SCC 742 : 1975 SCC (Cri) 202
14. 1985 Supp SCC 599 : 1985 SCC (Cri) 505
15. 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60
16. (1999) 5 SCC 30 : 1999 SCC (Cri) 651 : AIR 1999 SC 1969 : 1999 Cri LJ 2889
17. (2000) 8 SCC 457 : 2000 SCC (Cri) 1546
18. (2005) 1 SCC 237 : 2005 SCC (Cri) 292 : 2005 Cri LJ 143
19. (2007) 12 SCC 630 : (2008) 3 SCC (Cri) 319
20. (1970) 2 SCC 122 : 1970 SCC (Cri) 337
21. AIR 1967 SC 792 : 1967 Cri LJ 671 : (1967) 1 SCR 243
22. (1977) 3 SCC 68 : 1977 SCC (Cri) 421
23. (1948-49) 76 IA 147
24. AIR 1958 SC 500 : 1958 Cri LJ 976
25. AIR 1964 SC 1184 : (1964) 2 Cri LJ 344
26. AIR 1968 SC 832 : 1968 Cri LJ 1017
27. 1994 Supp (2) SCC 73 : 1994 SCC (Cri) 851